ORIGINAL

Before The

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
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PETITION FOR LIMITED RECONSIDERATION

PAGING NETWORK, INC.

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Summary

The Commission's *Second Report* goes a long way toward eliminating the existing discrimination against competing local exchange carriers and affirms that local exchange carriers, in their role as numbering plan administrator, cannot discriminate against wireless carriers. The *Second Report* also puts to a stop the LEC practice of charging the wireless industry for telephone numbers, a practice that was both unreasonable and discriminatory. Nonetheless, PageNet believes the wireless industry, in general, and PageNet in particular, is adversely affected by certain conclusions reached in the *Second Report* and, in one instance, the Commission's silence on one key issue raised by PageNet and, so, seeks limited reconsideration. In particular, the Commission did not address the discrimination against wireless service that is inherent in the existing pattern of untimely number relief. This problem is exasperated by the FCC's conditioning overlay relief on the availability for assignment of existing NXX codes for each carrier, even though NXX codes can be assigned on an overlay basis pending completion of the relief planning and review process without dictating the ultimate form of relief.

The Commission also refused to preempt the mandatory take-back of wireless type 2 numbers in a split, numbers which are tandem interconnected, and thus bear no relationship to the

geography of the customer, even though such take-backs arbitrarily interfere with subscriber choice without promoting any public purpose.

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PETITION FOR LIMITED RECONSIDERATION

Pursuant to Rule 1.429 of the Commissions Rules for Rulemaking Proceedings (16 C.F.R. § 1.429), Paging Network, Inc. ("PageNet"), by its undersigned attorneys, hereby petitions for reconsideration of the Commission's Second Report and Order and Memorandum Opinion and Order, which was released in this proceeding on August 8, 1996 ("*Second Report*"). The Commission's *Second Report* goes a long way toward eliminating the existing discrimination against competing local exchange providers and affirms that local exchange carriers ("LECs"), in their role as numbering plan administrators, cannot discriminate against wireless carriers. The *Second Report* also puts to a stop the LEC practice of charging the wireless industry for telephone numbers, a practice that was both unreasonable and discriminatory.

Nonetheless, PageNet believes the wireless industry, in general, and PageNet in particular, is adversely affected by narrow conclusions reached in the *Second Report* and, so, seeks limited reconsideration.

I. The FCC Needs To Adopt Proactive Numbering Plan Criteria To Assure Timely Relief: There Is Discrimination Against Wireless Service Inherent In The Existing Pattern Of Untimely NXX Code Relief.

In its *Ameritech Order*[1], the Commission declared that numbering resource administration must be even handed and technology neutral. *Id.* at ¶ 18. It further stressed that it is essential that such resources be made available on a "timely basis". *Id.* (Emphasis supplied.) *See also id.* at ¶ 19; *Second Report* at ¶ 281. In its comments on number administration in this docket, PageNet demonstrated that these important objectives have been frustrated by delays in the planning, review and implementation of NPA relief plans.[2] It explained that resulting NXX code shortages disproportionately impact wireless services because wireless carriers are able to use numbering resources more efficiently than wireline carriers as, unlike wireline carriers, they are able to assign numbers without regard to a subscriber's geographic location. *Id.* at 19. Wireless carriers typically have NXX code fill factors substantially in excess of 90% in comparison with wireline factors of 50%. *Id.* NXX code shortages created by relief plan implementation delays thus are

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1 *In re Matter of Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, Declaratory Ruling and Order, FCC, IAD File No. 94-102 (released January 23, 1995) ("*Ameritech Order*").

2 PageNet's Separate Comments on Number Administration, CC Docket No. 96-98, at 11-23 (dated May 20, 1996) ("*PageNet's Comments*").

much more likely to result in a denial of wireless service than wireline. *Id.* PageNet further described how problems created by the delayed implementation of relief plans were frequently resolved by imposing on paging services discriminatory number take-back and dialing requirements. *Id.* at 11-19.

To remedy these problems, which are clearly inconsistent with *Ameritech Order* standards, PageNet suggested, as one possible approach, the use of triggers by which relief NXX codes would be made available as an overlay within an existing area code pending the completion of the relief planning and review process. *Id.* at 9-11. It explained how a judicious assignment of relief NXX codes could preserve a split relief option without the need for code rationing and the wireless service discrimination that is inherent in such rationing. *Id.* 10-11.

The Commission's *Second Report* is completely silent on the problem of delayed NXX code relief, which has become the norm, and the resulting service discrimination. The *Second Report* treats PageNet's proposed required implementation of an overlay pending completion of the relief planning and review process as an example of a <u>restriction</u> that PageNet would impose on the right of state commissions to choose overlay plans. *See Second Report* at ¶ 282. It is clear, though, from a review of PageNet's comments, that PageNet strongly believes that overlays are the preferred relief alternative in rapidly growing metropolitan

areas of the country. It does not seek to restrict their use. It is also clear that PageNet's proposed default use of overlays was intended to give state commissions the ability to complete review proceedings without the need to ration NXX codes and without dictating the ultimate choice of a split or an overlay. Based on the foregoing, it would appear that the Commission misread PageNet's comments thus did not adequately address the serious issue of delayed NXX code relief raised therein.

The Commission must thus reconsider its *Second Report* and address the problem of delayed NXX code relief. As more fully explained in its comments, PageNet suggests the use of overlays and NXX code depletion triggers as a means of assuring that numbers are always available on a timely basis. PageNet's Comments at 9-11. Other solutions are possible, but the matter must be addressed.

II. Conditioning Overlay Relief on the Availability of Existing NXX Codes is Inconsistent with the Ameritech Order.

PageNet strongly agrees with the Commission's conclusion that all-service overlays should be a permissible relief option. *See Second Report* at ¶282. It also agrees that such overlays should be implemented with mandatory 10-digit dialing. *Id.* at 286. It disagrees, though, that overlays should be conditioned on the availability of an existing NXX code for assignment to each existing carrier during the 90 day period proceeding the implementation of an overlay. *See id.* Strictly construed, that

condition could needlessly prevent the use of relief NXX codes (those from the new area code) on an overlay basis pending the completion of the relief planning and review process simply because the supply of available NXX codes has dropped below a certain level. That again will result in code shortages which, as discussed above, inherently result in discrimination against wireless carriers in violation of the *Ameritech Order*. *See also, e.g. Second Report and Order* at ¶ 281.[3] It will not, moreover, serve any useful purpose because the use of relief NXX codes on an overlay basis pending the implementation of a split will not interfere with that implementation.

PageNet would not object to such a condition, however, if the Commission modified it expressly to authorize such overlay assignments of relief NXX codes. That would make NXX codes available on a timely basis without the need for rationing. A split could still be implemented, as explained before,[4] with an

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3 Lotteries have been adopted or proposed in California, Massachusetts, Pennsylvania and New Jersey to allocate codes in short supply. Such schemes sharply depart from ordinary industry assignment principles of "first come, first served." They also are inconsistent with the Commission's own declaration that "incumbent LECs should apply identical standards and procedures for the processing of all numbering requests, regardless of the identity of the party making the request." *Second Report* at ¶ 334.

4 *See* PageNet's Comments at 10-11.

appropriate period for permissive dialing, as long as the relief NXX codes (those from the new area code) assigned do not conflict with existing NXX code assignments in the new area code where the numbers are to be changed.

III. The Commission Should Not Permit The Mandatory Take-Back Of Type 2 Wireless Numbers In A Split.

In its comments on number administration, PageNet demonstrated that a take-back of Type 2 wireless numbers in a split is neither technically required nor justified in terms of any equitable sharing of relief burdens. PageNet's Comments at 24-27. Take-backs are not technically required because Type 2 wireless numbers out of tandem switches -- unlike wireline numbers out of wire centers -- are not tied to any fixed geographic location. Take-backs of Type 2 numbers are, further, not justified because voluntary subscriber requests typically result in a level of number relief and carrier burden that is comparable to what occurs in the case of a mandatory number take-back. The only real difference is that the latter arbitrarily interferes with subscriber choice.

Despite this showing, the Commission refused to preempt the Public Utilities Commission of Texas' ("PUCT") threatened take issue though, as the Commission seems to imply, is not whether there should be a sharing of burdens. It is clear that there will be such sharing even if wireless subscribers are permitted to make their own decisions as to whether they need or want to

change their numbers. The question is whether public policy is really served by arbitrarily depriving them of the right to make that decision for themselves, and the Commission fails to address why it believes that the PUCT should be permitted to do so.

IV. The Commission Erred In Excluding Paging Carriers From The Definition Of Those Carriers Providing "Telephone Exchange Service"

The Commission, in a passing footnote reference (at ¶ 333, n.700) concludes that paging is not "telephone exchange service."[5] That premise, however, is both wrong and inconsistent with prior precedents and the conclusion that the Commission reached (at ¶¶ 1013-15 of the *First Report and Order* in this docket), that CMRS providers in general offer services that are "at a minimum" comparable services to telephone exchange service.[6] *First Report* at ¶ 1013.

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5 PageNet has sought reconsideration of the *First Report and Order* in this docket, insofar as it inferred (at ¶ 1005) that paging carriers were not offering telephone exchange services within the meaning of the 1934 and 1996 Acts. PageNet has repeated those arguments here in somewhat truncated form out of an abundance of caution.

6 The full text of the quoted definition is as follows:

> "Telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. 47 U.S.C. § 153(32).

In the first instance, paging carriers have been found to offer exchange service almost since their inception. *See, e.g., Public Notice*, 1 FCC 2d 830 (1965), (paging and mobile telephone service found to be exchange service within the meaning of Section 221(b).) Moreover, in interpreting the Modification of Final Judgment ("MFJ"), the court ruled that one-way paging services are "exchange telecommunications services" within the meaning of the decree and, thus, awarded the paging assets to the BOCs. *See United States v. Western Electric Co.*, 578 F.Supp. 643, 645 (D.D.C. 1983)(reversed in part on other grounds). These decisions make clear that both the Commission and the courts have consistently held that paging services are "exchange services" under the 1934 Act.

Clearly, then, paging services also fall within the broader definition of exchange service, which was expanded to include services comparable to exchange service "provided through a system of switches, transmission equipment or other facilities (or continuation thereof) by which a subscriber can originate and terminate a telecommunications service."

Moreover, the FCC's conclusion that cellular, PCS and SMR service providers, at a minimum, fall within this broader definition bolsters this conclusion. As noted and as described in Attachment 1, the network topography and services offered by wireless networks are substantially similar.

A finding that paging is exchange service is not prohibited, for example, by the reference to "intercommunicating service." "Intercommunicating" service includes one-way service. *Webster's Collegiate Dictionary* at 596 (G&C Merriam Company, Springfield, Mass., 1973), thus includes within its definition of "intercommunicate," "to afford passage from one to another." It does not require an interactive exchange.

Nor does the reference in Section 153(32) (B) alternative definition to "originate and terminate" preclude paging carriers from inclusion in the term "telephone exchange." In construing the similar phrase "telephone exchange service and exchange access" contained in Section 251(c), the Commission interpreted that phrase to include both the conjunctive and the disjunctive. *First Report* at ¶ 179. It, thus, interpreted "and" to mean either "and" or "or" so that ILECs "must provide interconnection for purposes of transmitting and routing telephone traffic or exchange access traffic or both." *Id.* It did so, just as it should here, to be consistent "with both the language of the statute and Congress' intent to foster entry by competitive providers into the local exchange market" citing *Peacock v. Lubbock Compress Company*, 252 F.2d 892, 893 (5th Cir. 1958).

It is clear that a contrary interpretation would be inconsistent with that purpose. Increasingly, paging competes with wireline telemessaging services, such as voice mail, as well as the services offered by other wireless carriers. A failure to include paging within the definition of a telephone exchange

service, though, arguably would mean that LECs would not be obligated to provide services in a nondiscriminatory fashion to cellular, PCS, SMR and paging. Absent protections guaranteed elsewhere by the statute or by the Commission, that could severely handicap paging in competition with wireline and other wireless services and inhibit both existing and future competition. Clearly, that is not what Congress intended. For that reason, the Commission must conclude that paging is a comparable telephone exchange service within the meaning of Section 3(47), alternatives (A) and (B).[7]

The Commission's analysis of Section 3(26) (local exchange carrier) and Section 253(f) (at ¶ 1014 of the *First Report*) supports the premise that all CMRS providers are telephone exchange providers, not just two-way interactive service providers. There, the Commission notes that the 1996 Act's exclusion of CMRS providers from local exchange carrier status would not have been necessary if CMRS providers were providing telephone exchange service. *Id.* The Commission interprets the statute as suggesting that "some" CMRS providers are providing telephone exchange or exchange access, but there is no basis for limiting such interpretation to cellular. If the statute had

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[7] Such a conclusion would not have Section 271(c)(1)(A) checklist implications. That section only requires that BOCs have interconnection agreements with one or more providers of alternative (A) telephone exchange service. A BOC, thus, could not satisfy this requirement by entering into such an agreement with a paging carrier.

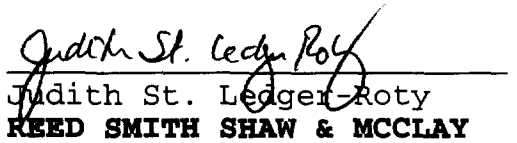
meant to specifically refer to a class of CMRS provider, such as cellular, it would have done so. For example, as the Commission recognizes, Section 271(c)(1)(A) specifically excludes cellular (by reference to cellular rule sections) from being considered to be LECs for purposes of that section. The statutes' reference to "CMRS carriers" should be read to exclude all such carriers from LEC status but, at the same time, to indicate the need for such exclusion in order to avoid a contrary result for all CMRS providers, including paging.

V. Conclusion

For the reasons stated above, PageNet's Petition for Limited Reconsideration should be granted.

Respectfully submitted,

PAGING NETWORK, INC.



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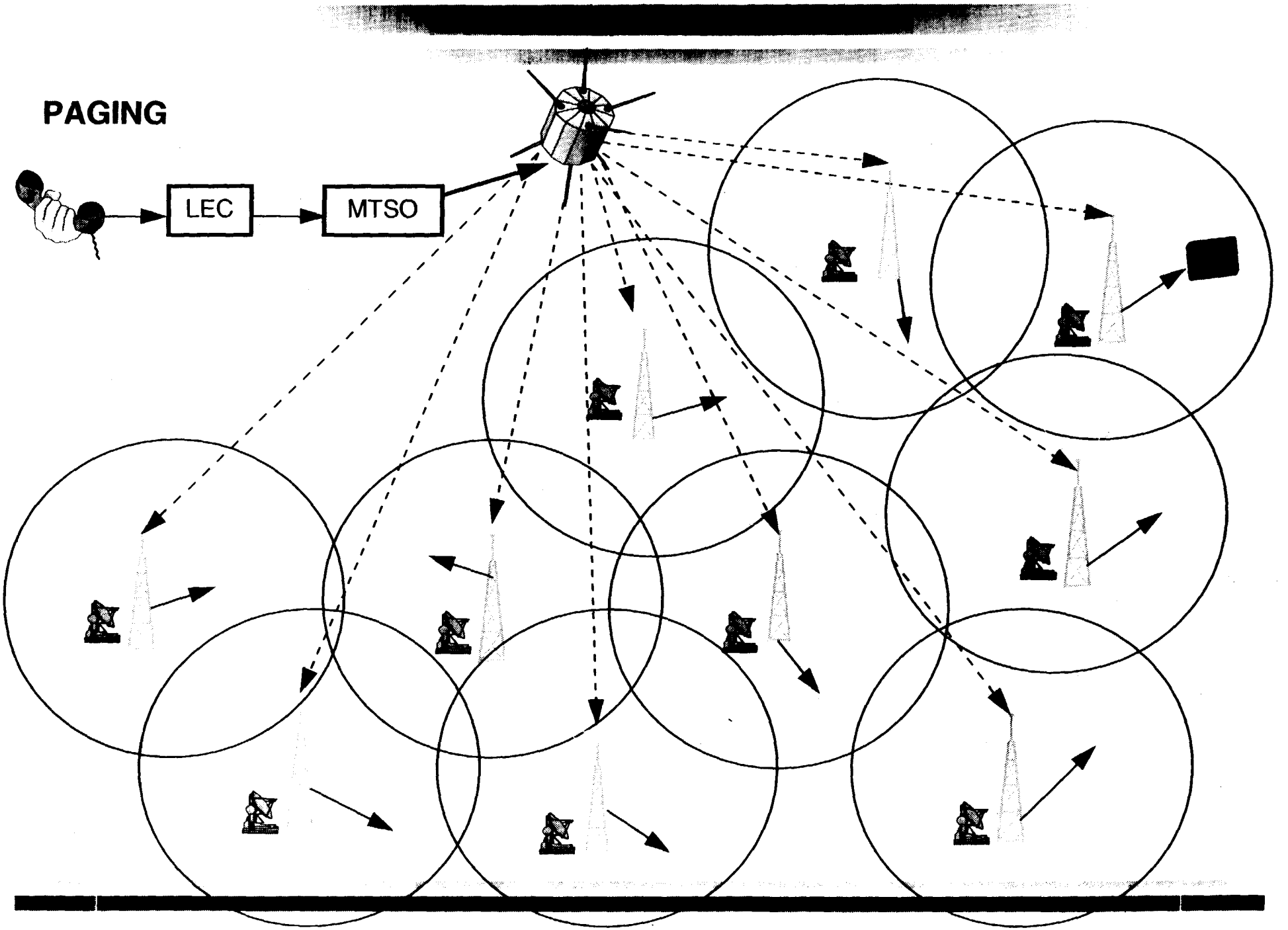
ATTACHMENT 1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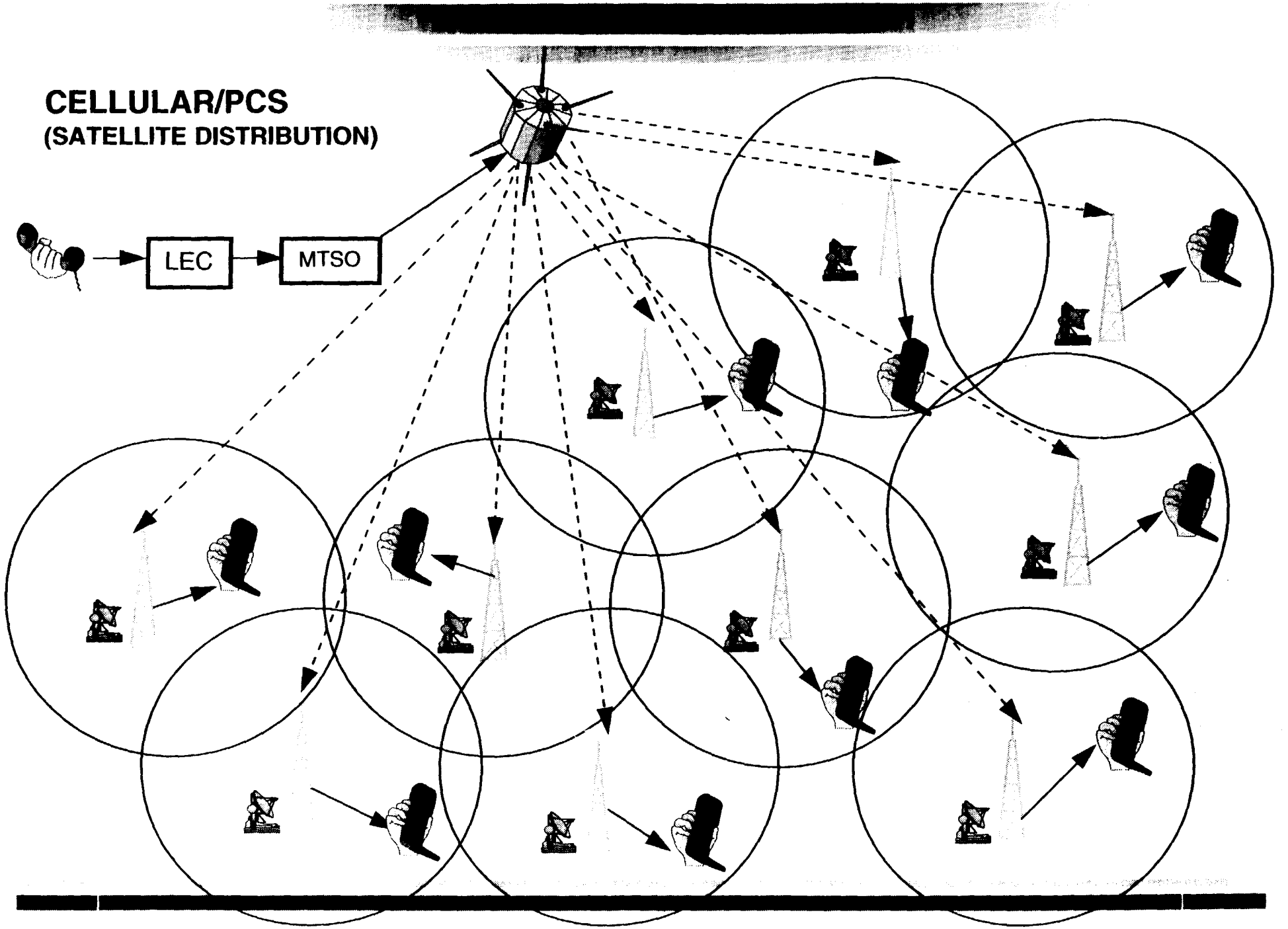
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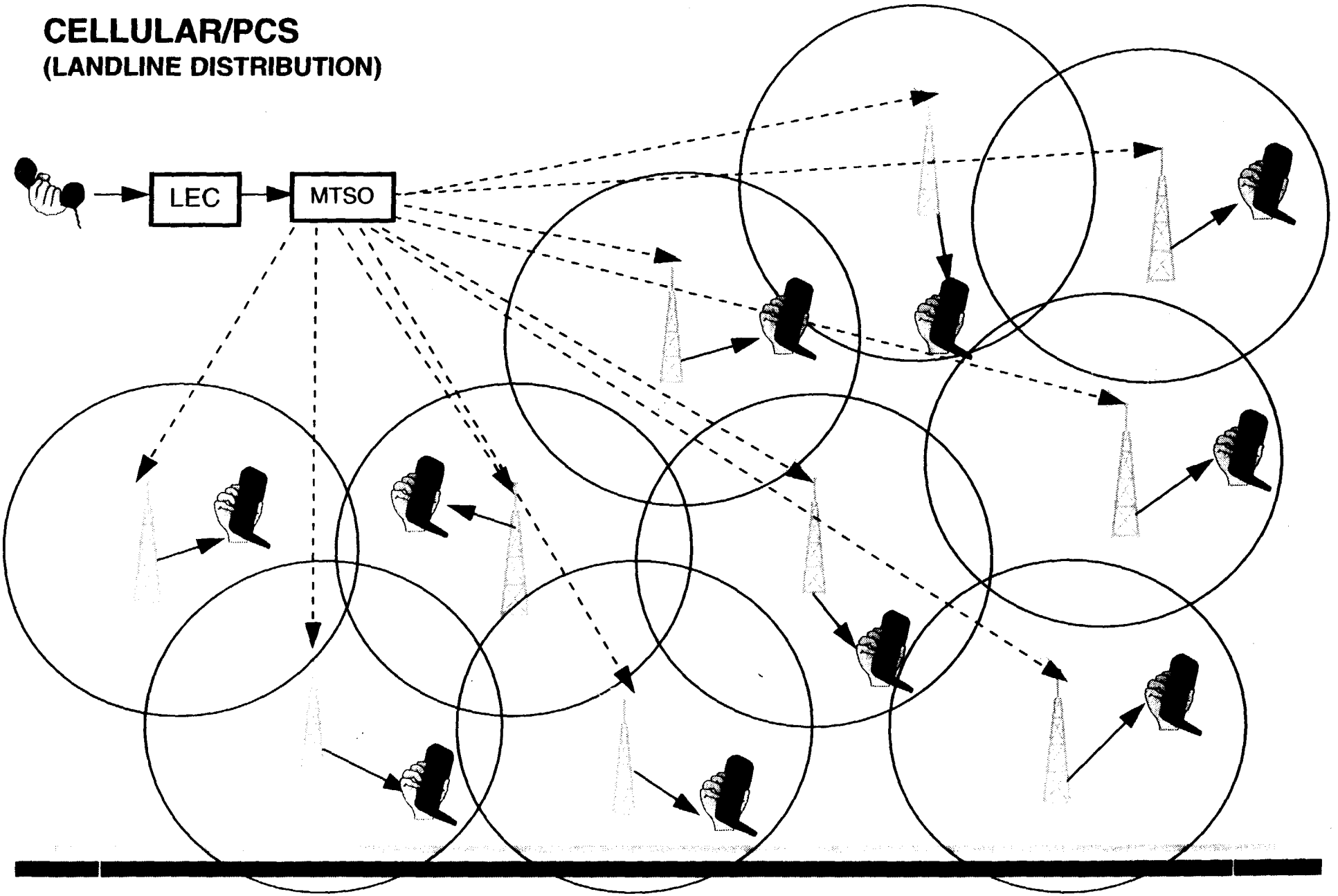

SMR
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